Scottish Civil Justice Council

Response to the consultation on: **Rules Covering the Mode of Attendance at Court Hearings**
By Fred Mackintosh QC

Question 1 – For the categories of case listed as suitable for an in-person hearing: Do you think the general presumption given is appropriate? And would you make any additions or deletions and if so why?
[1] I don't disagree with the listing of the various hearings in proposed Rule 35B.2(2) as being suitable for in person hearings, but I would respectfully submit that the general presumption is misconceived. The council seems to see a distinction between some of the hearings listed in Rule 35B.2(2) and those listed in Rule 35B.3 that is not real.
[2] My area of civil practice is judicial review and in many cases petitioners are seeking to have the courts review significant decisions that have a real impact on their lives. There are often complex factual backgrounds and despite the best efforts of counsel on both sides it is often the case that issues arise at the substantive hearing (often relating to judicial questions) and it is then important that petitioners can properly participate in the hearings. Watching at home on Webex (or even worse in a phone call) when their solicitor is somewhere else and counsel in third location is a poor substitute for the option of being in court. For example, when a student challenges a decision of their university to expel them it should not be the case that it is easier for the university to update their legal team about factual issues that arise that it should be for the student to point out a factual issue to their lawyers. There is also a real issue for prisoners in judicial review proceedings against decisions of Scottish Ministers and the Parole Board of Scoltand where there is generally no means for the prisoner to contact his lawyer during the hearing and in addition the Scottish Prison Service will give priority for use of limited video link facilities to criminal cases it will be practically impossible for the prisoner to participate. The council is right to care about the individuals who actively participate in the sort of hearings listed in Rule 35B.2(2), but the same will apply to some petitioners in judicial review proceedings.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): Do you think the general presumption given is appropriate? and would you make any additions or deletions and if so why?
[3] As explained above I do not agree with the presumption because some substantive judicial review hearings will clearly have real and significant impacts on the private lives of petitioners and the hearings should take place in person if parties wish, but there is also the issue of whether there is open justice online. The system of only allowing people who the SCS accept are journalists to view the video feed on Webex and the others end up on audio only is a poor substitute. Think about important decisions on vital issues in public life that arise in judicial review proceedings (for example issues around 'the right to die' in *Ross v Lord Advocate* 2016 SC 502 or the various cases in 2019 around Brexit and the decision of the UK Government to unlawfully prorogue parliament). The decision to only allow the press to see the court and counsel speak and to demote everyone else to audio only will ensure that the Court of Session is seen as private and secret. It

will lose its place at the heart of public life when issues come before it.
[4] The presumption should be that all substantive hearings in judicial review that will determine the issue before the court should in public. It would be open to parties to agree to a Webex hearing and that will happen often, but the starting point should be that justice takes place in the open. I heard the Lord President explain in his remarks at the start of the legal year that a reason for the presumption for video hearings was that he was concerned about the risk of a 'super spreader' event at Parliament House. I would respectfully point out to the Council that even if such a risk is real now it won't be a risk in the long run and in any event the risk (such as it is) is being run every day at Glasgow Saltmarket and Glasgow Sheriff Court where busier buildings thant Parliament House at its busiest have been operating for months.
[5] I note paragraph 19 of the Consultation Paper. It is misconceived. There is no realistic prospect that technology will ever create "*appropriate safeguards … to deal with potential contempt of court issues; i.e. the unauthorised recording and storage of images and sound, and the potential for misuse of that material through unauthorised broadcasting during hearings*". It will always be possible for a malicious actor to point their mobile phone at a screen showing the Webex link and record or livestream the court for whatever purpose they wish. No doubt the Court would respond firmly to persons who were caught doing this, but technology won't stop it. As a criminal defence practitioner, I am well aware that there is a serious issue in the field of sexual offences, harassment and bullying that involves people recording video calls with other persons without permission and then using those recordings for malicious ends. Facebook, Snapchat, Instagram and the gaming industry have failed to solve this problem and they won't solve it for the Scottish Courts. The council should proceed on the basis that there will never be a technological safeguard. If that is the case then member of the public will never be given Webex access and will never again see our courts in action. The presumption should be for in person substantive hearings unless parties agree.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: Do you think lodging a motion is the right way to do that? Please explain your answer.
[6] The presumption should be for open in person hearings. From my experience of the system that long operated pre pandemic to permit prisoners to hear their sentence appeals by video the judiciary has almost invariably refused to permit appellants to attend in person when applications have been made. I have had partially deaf appellants forced to watch by video and vulnerable young people with ADHD and other learning difficulties forced to watch the court on a small screen in prison. They did not understand what was going and they could not meaningfully participate. The test at draft rule 35B.5(1) is far too vague and will result in the public forming the view that the judges and courts in Scotland are remote and uninterested. Justice that takes place in secret where those effected by decisions who are not parties can only listen on the phone is not justice and the public will decide that the courts don't care. That is not a prospect to relish and the reputation of the Court of Protection in England and Wales should be seen as a warning of what can happen when a court is perceived (even with the best intention) as being secretive.
Question 4 – The courts can change the mode of attendance if circumstances

warrant a different choice to the general presumption: Do you agree that the court

should have the final say? Please explain your answer
[6] No. If one of the parties feels that they would benefit by being able to see and hear the substantive hearing, then they should be able to insist on an in-person hearing. The Court should be able to require an in-person hearing if it feels that the issue is one of public importance.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?
[7] Only this, Scotland is a small country. Ideas build up and the public's view changes. It would not take many examples of significant decisions that have real impact on the private and family life of people in Scotland being heard in what will be described as "secret courts" for significant voices to criticise the courts and their approach. Such an outcome will harm the status of the courts and undermine the rule of law. Justice must be seen to be done. The Courts should ensure that their work is one in as public a manner as can be achieved and that means in-person substantive hearings.

Fred Mackintosh QC